(5)

No. 91-469

MOTION FILED
OCT 16 1991

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PARAGOULD CABLEVISION, INC.,
Petitioner,

v.

CITY OF PARAGOULD & THE PARAGOULD LIGHT AND WATER COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF TELE-COMMUNICATIONS, INC., UNITED ARTISTS ENTERTAINMENT CO., STORER COMMUNICATIONS, INC. AND COMCAST CABLE COMMUNICATIONS, INC. IN SUPPORT OF PETITIONER

TERRY S. BIENSTOCK *
PHILIP J. KANTOR
MARILYN DUCATO
BIENSTOCK & ASSOCIATES, P.A.
Southeast Financial Center
Suite 3160
200 South Biscayne Blvd.
Miami, Florida 33131-2367
(305) 373-1100

Counsel for Amici Curiae Tele-Communications, Inc., United Artists Entertainment Co., Storer Communications, Inc. and Comcast Cable Communications, Inc.

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-469

PARAGOULD CABLEVISION, INC.,
Petitioner,

v.

CITY OF PARAGOULD & THE PARAGOULD LIGHT AND WATER COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

Tele-Communications, Inc., United Artists Entertainment Co., Storer Communications, Inc. and Comcast Cable Communications, Inc. (hereinafter collectively referred to as "the Cable Operators"), pursuant to Rule 37.2 of the Rules of the Court, respectfully request leave to file the attached brief as amici curiae in support of the petition of Paragould Cablevision, Inc. (hereinafter "Cablevision") for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Cablevision and respondent, The Paragould Light and Water Commission and its individual commissioners have consented to the filing of the brief amici curiae and their consents are being filed with the Clerk. Respondents, the

City of Paragould and its individual commissioners, have withheld their consent.

The Cable Operators are cable television companies operating cable television systems throughout the United States. These particular companies are among the largest multiple system operators in the nation. Over twelve million cable television customers receive their cable service from these four Cable Operators which own at least one cable system in every state in the United States. Each of the Cable Operators operate in communities in which the franchising authority either operates or is contemplating operating a municipally-owned cable system.

The law is only recently developing with respect to municipal ownership and operation of a cable television system when that municipality also franchises and regulates a privately owned competing cable system. The constitutional and Congressional constraints on that governmental conduct as decided by this Court, will affect the businesses of these Cable Operators on a daily basis. While the Cable Operators are not challenging municipal entry into the private marketplace, they contend that the First Amendment and antitrust ramifications of governmental conduct upon market participation are clearly at stake and need resolution. Absent review by this Court, Congressional directives set forth in the Cable Act and the antitrust laws will be thwarted, and will allow a First Amendment speaker to be supplanted by the government.

The attached brief amici curiae brings new and relevant information on this matter to the Court's attention. Accordingly, the motion to file the attached brief should be granted.

Respectfully submitted,

TERRY S. BIENSTOCK *
PHILIP J. KANTOR
MARILYN DUCATO
BIENSTOCK & ASSOCIATES, P.A.
Southeast Financial Center
Suite 3160
200 South Biscayne Blvd.
Miami, Florida 33131-2367
(305) 373-1100
Counsel for Amici Curiae Tele-Communications, Inc., United Artists Entertainment Co., Storer Communications, Inc. and Comcast Cable Communications, Inc.

* Counsel of Record

October 16, 1991

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF AMICI CURIAE	1
ARGUMENT	2
I. A CITY PARTICIPATING IN A MARKET AND WHICH HAS OVERSTEPPED THE PARAMETERS ESTABLISHED BY THE ANTITRUST LAWS IS NOT ENTITLED TO STATE ACTION IMMUNITY	2
II. GIVEN THE PROCOMPETITIVE PURPOSES OF THE CABLE ACT, A STATE MAY NOT AUTHORIZE A MUNICIPALLY-OWNED CABLE TELEVISION SYSTEM TO DISPLACE COMPETITION IN THE CABLE TELEVISION MARKET	9
III. A GOVERNMENTAL REQUIREMENT THAT A CITIZEN SURRENDER ITS FIRST AMENDMENT RIGHTS AS A CONDITION OF RECEIVING A FRANCHISE FROM THE GOVERNMENT IS UNCONSTITUTIONAL	15
CONCLUSION	20

TABLE OF AUTHORITIES

CASES: Page

Cable Alabama Corp. v. City of Huntsville, Alabama, 768 F. Supp. 1484 (N.D. Ala. 1991) 14
Cable Holdings of Georgia, Inc. v. Home Video, Inc., 825 F.2d 1559 (11th Cir. 1987) 14
Cable Investments, Inc. v. Woolley, 867 F.2d 151 (3d Cir. 1989) 13
Cannon v. University of Chicago, 441 U.S. 677 (1979) 13
Centel Cable Television Co. of Florida v. Admiral's Cove Associates, Ltd., 835 F.2d 1359 (11th Cir. 1988) 13
Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980) 20
Chicago Cable Communications v. Chicago Cable Comm'n, 879 F.2d 1540 (7th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 839 (1990) 19
City of Columbia v. Omni Outdoor Advertising, Inc., —— U.S. ——, 111 S.Ct. 1344 (1991) 3, 5, 10, 11
City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488 (1986) 5, 6, 15, 17
City of New York v. F.C.C., 486 U.S. 57 (1988) 13
Community Communications Co., Inc. v. City of Boulder, Colorado, 455 U.S. 40 (1982) 10
Conley v. Gibson, 355 U.S. 41 (1957) 3
Elrod v. Burns, 427 U.S. 347 (1976) 19
Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926) 16, 17, 18, 19
H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989) 5
Hanover First Ins. Co. v. Harding, 272 U.S. 494 (1926) 20
Hishon v. King & Spalding, 467 U.S. 69 (1984) 5
Kadrmas v. Dickson Public Schools, 487 U.S. 450 (1988) 19
Kerasotes Michigan Theaters, Inc. v. National Amusements, Inc., 854 F.2d 135 (6th Cir. 1988), *cert. dismissed*, 490 U.S. 1087 (1989) 6
Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 4, 7, 8, 10

TABLE OF AUTHORITIES—Continued

	Page
Leathers v. Medlock, —— U.S. ——, 111 S.Ct. 1438 (1991)	15
National Cable Television Ass'n, Inc. v. F.C.C., 914 F.2d 285 (D.C. Cir. 1990)	13
Neitzke v. Williams, 490 U.S. 319 (1989)	5
Paragould Cablevision, Inc. v. City of Paragould, 739 F. Supp. 1314 (E.D. Ark. 1990), *aff'd*, 930 F.2d 1310 (8th Cir. 1991)	*passim*
Parker v. Brown, 317 U.S. 341 (1943)	10
Parks v. Watson, 716 F.2d 646 (9th Cir. 1988)	7, 8
Paul v. Virginia, 8 Wall 169 (1869)	20
Perry v. Sindermann, 408 U.S. 593 (1972)	19
Philadelphia Fire Ass'n v. New York, 119 U.S. 110 (1886)	20
Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464 (1962)	3, 14
Power Manufacturing Co. v. Saunders, 274 U.S. 490 (1927)	19
Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434 (D.C. Cir. 1985)	16
Radovich v. National Football League, 352 U.S. 445 (1957)	3
Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc., 714 F.2d 351 (4th Cir. 1983), *cert. denied*, 465 U.S. 1027 (1984)	14
Shapiro v. Thompson, 394 U.S. 618 (1969)	19
Sherbert v. Verner, 374 U.S. 398 (1963)	16, 19
Speiser v. Randall, 357 U.S. 513 (1958)	19
Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985)	9, 10, 11
Traynor v. Turnage, 485 U.S. 535 (1988)	13
Union Pacific R.R. Co. v. United States, 313 U.S. 450 (1941)	3, 4, 5, 8
United States v. Employing Plasterers Ass'n of Chicago, 347 U.S. 186 (1954)	3, 14
Western & Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. 648 (1981)	19
Wieman v. Updegraff, 344 U.S. 183 (1952)	19

TABLE OF AUTHORITIES—Continued

	Page
STATUTES:	
Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521, *et seq.*	*passim*
Elkins Act, 49 U.S.C. § 41	4, 8
Sherman Act, 15 U.S.C. § 2 (1988)	6, 10
RULES:	
Rule 8(c), Federal Rules of Civil Procedure	15
Rule 12(b) (6), Federal Rules of Civil Procedure	6
ADMINISTRATIVE RULINGS:	
Federal Communications Commission	
In re Community Cable TV, Inc., C.S.R.-2269 (adopted November 15, 1983)	14
In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, FCC-90-276 (July 31, 1990)	14
LEGISLATIVE HISTORY:	
H.R. Rep., No. 934, 98th Cong., 2d Sess. 18, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655	12, 13, 14
Senate Comm. on Commerce, Science and Transportation, S. Rep. No. 98-67, 98th Cong., 1st Sess. (1983)	14
130 Cong. Rec. S14,283 (daily ed. Oct. 11, 1984)	13

BRIEF AMICI CURIAE OF TELE-COMMUNICATIONS, INC., UNITED ARTISTS ENTERTAINMENT CO., STORER COMMUNICATIONS, INC. AND COMCAST CABLE COMMUNICATIONS, INC. IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE

Tele-Communications, Inc., United Artists Entertainment Co., Storer Communications, Inc. and Comcast Cable Communications, Inc. (hereinafter collectively referred to as "the Cable Operators"), submit this Brief Amici Curiae in support of the petition for a writ of certiorari filed by Paragould Cablevision, Inc. (hereinafter "Cablevision").

Each of the Cable Operators operates a cable television system in one or more communities in which the municipality or other franchising authority is operating its own cable system in direct competition with the Cable Operator or in which the city is investigating the possibility of constructing and operating a municipally-owned competing cable television system. The Cable Operators operate at least one cable television system in all 50 states plus the District of Columbia and Puerto Rico, providing cable services to over 12 million subscribers pursuant to franchises granted by more than 4,000 communities.

This case raises three significant issues. First, when a municipality competes with a private cable operator and at the same time regulates its own competitor, should that municipality be required to abide by the same antitrust laws which constrain its private sector competitor? In other words, when a local governmental entity enters the private sector marketplace, should it be subject to private sector antitrust laws. Second, given the procompetitive purposes of the Cable Communications Policy Act of 1984 ("the Cable Act"), 47 U.S.C. §§ 521, *et seq.*, may a state authorize a municipally-owned cable system to displace competition in the cable television market? Finally, may a franchising authority require a cable opera-

tor to bargain away some of its constitutionally guaranteed rights as a condition of granting it a franchise, which is a federally mandated prerequsite to providing cable service? The Cable Operators assert that these questions should be answered in the negative.

If the decision reached by the United States Court of Appeals for the Eighth Circuit is upheld by this Court, other municipalities throughout the nation will be free to restrain the First Amendment rights of privately-owned cable operators as a condition of granting the required franchise, and will likewise be able to engage in anticompetitive conduct with complete immunity. That result has far-reaching effect on all cable operators providing cable service throughout the United States. In addition, the decision of the court below seriously threatens the equilibrium established by the Cable Act, as well as the antitrust laws, by permitting a municipality, acting simultaneously as a franchiser and a competing market participant, to operate its competing cable system in an anticompetitive fashion with full and complete immunity.

The Cable Operators contend that Cablevision's petition raises important constitutional and statutory questions meriting this Court's review.

ARGUMENT

I. A CITY PARTICIPATING IN A MARKET AND WHICH HAS OVERSTEPPED THE PARAMETERS ESTABLISHED BY THE ANTITRUST LAWS IS NOT ENTITLED TO STATE ACTION IMMUNITY.

The first issue presented in this case is whether a municipality participating in a market may compete with private industry and engage in conduct otherwise violative of the antitrust laws. In other words, may a municipality, which has certain regulatory authority over the cable television market, operate a competing cable television system in an anticompetitive manner and still be entitled to state action immunity? In the case at bar, the trial court dismissed with prejudice and the Eighth Cir-

cuit affirmed,[1] on the basis of facts not alleged in the complaint, an action brought by Cablevision alleging that respondents were participating in the cable television market in an anticompetitive manner.

A motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This is particularly true in an antitrust suit which is often fact-laden. In such cases, the alleged facts need not be spelled out with exactitude, nor must recovery appear imminent. *See Poller v. Columbia Broadcasting Systems, Inc.*, 368 U.S. 464, 473 (1962); *United States v. Employing Plasterers Ass'n of Chicago*, 347 U.S. 186, 188-89 (1954). Hence, a complaint should not be dismissed unless it is found to be "wholly frivolous." *Radovich v. National Football League*, 352 U.S. 445, 453 (1957).[2]

In this case, Cablevision alleged that respondents, the City of Paragould ("the City") and the Paragould Light and Water Commission ("CLW"), are participating in the cable television market in Paragould. Complaint at ¶ 24. While a clearly defined "market participant" exception to state action immunity has yet to be articulated, this Court recently stated that when a state or municipality "acts as a commercial participant in a given market" antitrust "immunity does not necessarily obtain." *City of Columbia v. Omni Outdoor Advertising, Inc.*, —— U.S. ——, 111 S.Ct. 1344, 1351 (1991). In noting this possible exception, the Court relied on *Union Pacific R.R. Co. v. United States*, 313 U.S. 450 (1941). *Id.* Based upon these decisions and the facts of this case, this appeal presents the appropriate circumstances for this Court to formally and specifically adopt this doctrine.

---

[1] 739 F. Supp. 1314 (E.D. Ark. 1990), *aff'd*, 930 F.2d 1310 (8th Cir. 1991).

[2] This is not to say that allegations which fail to plead the essential elements of a cognizable antitrust claim cannot be dismissed. However, in this case, the courts below recognized the viability of a "monopoly leveraging" claim, but expressly declined to reach the merits. 739 F. Supp. at 1321; 930 F.2d at 1313.

In *Union Pacific*, Kansas City, Kansas ("Kansas") sought to develop its market presence as a metropolitan rail food terminal with wholesale and retail produce markets to the disadvantage of nearby Kansas City, Missouri ("Missouri"). It also developed a plan to induce Missouri produce dealers to lease its facilities by offering cash payments and temporary reduction of rent. The district court permanently enjoined Kansas from giving cash or rental credits to Missouri dealers as an incentive for them to move to Kansas. In affirming the grant of injunctive relief, this Court found this preferential treatment violative of the Elkins Act.[3] *Id.* at 471. This Court stated that "favoritism which destroys equality between shippers, however brought about, is not tolerated." *Id.* at 462. In this Court's view, action by any person to bring about discriminations in respect to the transportation of property is rendered unlawful by the Elkins Act. *Id.* at 463. The Court stated it had no objection to normal business practices used to promote the city's economic welfare. However, "the promotion of civic advancement may not be used as a cloak to screen the granting of discriminatory advantages to shippers." *Id.* at 465.

In *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (plurality opinion), this Court cited *Union Pacific* with approval as applicable to the antitrust laws. This Court stated that municipalities can be subjected to the same substantive standards of federal laws that impose sanctions for violations of the antitrust laws upon "persons." *Id.* at 400 & n.19. This Court, referring to *Union Pacific*, stated that "[i]t is significant that the cities' argument was rejected in the context of the antirebate provisions of the Elkins Act, a statute which essentially is an antitrust provision serving the same purposes as the anti-price-discrimination provisions of the Robinson-Patman Act." *Id.* at 403 n.19.

---

[3] The Elkins Act, 49 U.S.C. §§ 41-43, prohibits rebates, concessions and discriminations in respect to the transportation of property by railroads in interstate commerce.

The basis for the Eighth Circuit decision before this Court is the determination that entry into the cable television market by a municipality will necessarily result in certain displacement of competition. 930 F.2d at 314. The Eighth Circuit recognized the possible market participant exception, citing to *Columbia*, but dismissed it without analysis, stating that "the market participant exception is merely a suggestion and is not a rule of law." *Id.* at 1313. The Amici believe that the facts in this case merit the recognition of the market participant exception, or at the very least, the reversal of the order dismissing the complaint in order to develop a factual record. *See City of Los Angeles v. Preferred Communications*, 476 U.S. 488, 495 (1986).

In stark contrast to *Union Pacific*, in which this Court affirmed a permanent injunction based upon an extensively developed factual record, and to *Columbia*, in which a full trial was held, the courts below dismissed Cablevision's complaint based upon facts not even alleged in the complaint. For example, the court justified its determination as follows:

> [p]resumably, rent-free office space is available, employees and 'executives' are already hired and presently serving in other capacities, trucks and equipment to service cable needs are available, demographic information has been compiled and computerized, rights of way have been secured for other purposes, and utility poles are already standing.

930 F.2d at 1314. The lower court erred by relying on these presumed "resources" in total disregard of the basic principle that motions to dismiss may only be determined upon the well pleaded factual averments contained in or made a part of the complaint. *See H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249 (1989); *Neitzke v. Williams*, 490 U.S. 319, 326 (1989); *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Based on these "presumed" advantages enjoyed by the City vis-a-vis Cablevision, the court found that "the challenged

anticompetitive restraint is a necessary and reasonable consequence of the City's statutorily authorized entry into the cable television business." 930 F.2d at 1314. As such, the court intuited that displacement of competition was contemplated by the Arkansas legislature when it authorized cities to enter the cable television market.

While it may be true that some anticompetitive conduct may naturally result from the entry of a municipality into the cable television market, no support for such conclusion had yet been established in this record. Moreover, there is no indication that the state meant to immunize all anticompetitive conduct by municipalities, no matter how egregious. Conduct such as tying arrangements or predatory pricing of cable services do not reasonably flow from state permission for municipalities to operate cable systems; yet under the court's decision, such conduct could occur and the private cable operator would be left with no redress.

Cablevision alleged that respondents were prepared to leverage CLW's utility monopoly and to engage in predatory conduct to ensure that it was the only competitor left in the field, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2 (1988). Complaint at ¶¶ 27-33. Cablevision did not contend that respondents' decision to enter, or its entry, into the cable television market violated the Sherman Act. Instead, Cablevision alleged that the methods chosen and the intent of the City and CLW to destroy any competition in the cable television market within Paragould stated an antitrust claim.[4] *Id.* Under a Rule 12(b)(6) motion, all facts alleged by Cablevision in its complaint must be deemed to be true. *See Los Angeles v. Preferred*, 476 U.S. at 493.

Moreover, questions of fact remain as to the scope of the conduct immune under the state action immunity

---

[4] It cannot be disputed that Cablevision's allegations of cross-subsidization state a claim under the Sherman Act. *See* Kerasotes Michigan Theaters, Inc. v. National Amusements, Inc., 854 F.2d 135 (6th Cir. 1988), *cert. dismissed*, 490 U.S. 1087 (1989).

doctrine. Beyond its summary finding that the Arkansas State Legislature contemplated the "displacement of competition" when it enacted the subject statutes, the Eighth Circuit erred by failing to consider whether the displaced competition, which may have been contemplated, even corresponded with the specific anticompetitive conduct complained of here. Incorrectly, the Eighth Circuit was satisfied that if state action immunity applied, all claims of anticompetitive conduct would be barred. 930 F.2d at 1314. Plainly, this result perverts the state action immunity doctrine and directly conflicts with this Court's admonition in *Lafayette* that, absent specific state direction, the Court is "especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." 435 U.S. at 413.

There is no finding in the courts below, nor could there be any finding, that in authorizing municipalities to enter the cable television market, the Arkansas Legislature authorized (or under the Court's formulation—contemplated) such sharp anticompetitive conduct. In the absence of a record supporting such a finding, the respondents' claim of immunity to petitioner's specific claim of cross-subsidization should be denied. Indeed, while the subject statutes authorize the City to participate in the market, there is no reason to believe that the underlying state policy was to destroy the market and to drive its competitors out of business.

The reasoning of the decision in *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), is instructive to the resolution of this case. In *Parks*, an Oregon statute authorized public ownership of geothermal resources but did not expressly authorize the exclusion of private competition. *Id.* at 663. The court recognized that even if the statute contained a state policy to displace competition, such policy did not immunize the city from all antitrust attacks:

> . . . merely demonstrating a state policy to displace competition with monopoly public service does not necessarily satisfy the additional requirement that the legislature contemplate the kind of action complained

> of. For example, merely because the state may authorize a city to be the sole supplier of a natural resource and to set the price for that resource, it does not necessarily follow that the city is immunized from antitrust liability when it attempts to tie the purchase of a non-monopolized product or service to the sale of that natural resource. As the plurality stated in *Lafayette*, 'even a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization.' There is nothing in Chapter 523 [the state statute] which would allow us to infer that any authorization by the state to displace competition with city-run geothermal districts also includes authorization for a city to undertake anticompetitive actions in its efforts to establish such a district.

Id. at 663-64 (citations omitted).

Unlike the court in *Parks*, the lower courts misinterpreted the intent behind the Arkansas statutes which admittedly authorized entry by the City into the cable television market but *did not* and *could not* (under the antitrust laws and the Cable Act[5]) sanction the establishment of a monopoly public service.

Just as this Court in *Union Pacific* affirmed the district court's order granting a permanent injunction because appellants' conduct did not comport with the purpose behind the Elkins Act, this Court must now reverse the Eighth Circuit's decision in *Paragould* since respondents' participation in the cable market does not comport with the antitrust laws or the Cable Act. States may authorize local governments to regulate and compete in the cable television market only to the extent permitted by federal law. This Court should, therefore, hold that cities participating in a market that overstep the parameters established by the antitrust laws are not entitled to state action immunity. At the very least, this Court should

---

[5] The Amici contend that the anticompetitive conduct alleged by petitioner also results in a violation of the Cable Act's procompetitive purpose, and thus bars state action immunity, as fully discussed infra.

reverse the Eighth Circuit's opinion and reinstate Cablevision's complaint so that a record can be developed to determine if the City is properly acting as a "market participant."

II. GIVEN THE PROCOMPETITIVE PURPOSES OF THE CABLE ACT, A STATE MAY NOT AUTHORIZE A MUNICIPALLY-OWNED CABLE TELEVISION SYSTEM TO DISPLACE COMPETITION IN THE CABLE TELEVISION MARKET.

The second issue is whether, under the Cable Act, state statutes which authorize entry by municipalities into the cable television market automatically create immunity for anticompetitive conduct by those municipalities under the state action exemption to the antitrust laws. In particular, given the specific enterprise at issue, cable television, any analysis of this issue must take into account the Cable Act, as well as the federal antitrust laws. While the Cable Act permits a legislature to enact statutes which authorize the entry of municipalities into the cable television market, it does not authorize the Arkansas Legislature to enact laws which permit respondents to engage in anticompetitive conduct in order to displace competition. Such a construction would be in direct contravention of fundamental purposes underlying the Cable Act, which are to encourage growth of the cable television industry and to promote competition. In light of the procompetitive purposes of the Cable Act and its express language, the Arkansas Legislature could not have intended to displace competition with monopoly public service because the Cable Act does not authorize it to do so. That factor differentiates this case from those relied upon by the courts below. Thus, the courts below erred in finding that as a matter of law the anticompetitive conduct of the City and CLW was a "necessary and reasonable" consequence of a "clearly articulated state policy" to displace competition.

This Court said in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985), that "[t]he starting point in any analysis involving the state action doctrine is the

reasoning of *Parker v. Brown*, [317 U.S. 341 (1943)]." In *Parker*, the Court held that the Sherman Act did not apply to anticompetitive restraints imposed by the States "as an act of government." *Id.* at 352. This Court further ruled that because the federal antitrust laws contained no language specifically binding the states, it would not "attribute[] to Congress" such an intent given that the application of the federal antitrust regime would substantially limit the states' legislative capacity and consequently their sovereignty. *Id.* at 351.

Municipalities, on the other hand, are not beyond the reach of the antitrust laws. This Court held in *Lafayette*, that municipalities shall not be excluded from the antitrust laws because, as opposed to states, they are not sovereign. 435 U.S. at 412. This Court further explained:

> When [local governments] act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender. If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anti-competitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established. (footnotes omitted).

Id. at 408. This Court has determined that to be exempt from the antitrust laws, municipalities must demonstrate that their anticompetitive activities were authorized by the state "pursuant to state policy to displace competition with regulation or monopoly public service." *Id.* at 413; *Hallie*, 471 U.S. at 38. Moreover, the "state policy" that the municipality relies on for its antitrust immunity must be "clearly articulated and affirmatively expressed." *Lafayette*, 435 U.S. at 410; *Columbia*, 111 S.Ct. at 1359; *Hallie*, 471 U.S. at 44; *Community Communications Co., Inc. v. City of Boulder, Colorado*, 455 U.S. 40, 51 (1982).

Finally, this Court has held that "it is enough . . . if suppression of competition is the 'foreseeable result' of what the statute [at issue] authorizes." *Columbia*, 111 S.Ct. at 1350; *see also Hallie*, 471 U.S. at 41.

The Eighth Circuit adopted a literal application of *Hallie*, which was erroneous because it failed to take into account the Congressional constraints on state authority to regulate the cable industry, as set forth in the Cable Act. The Eighth Circuit held, in essence, that the mere fact that a state authorizes entry into the cable market necessarily implies a legislative intent to allow a municipality to displace competition by engaging in anticompetitive conduct. That construction frustrates the stated purposes of the Cable Act and the antitrust laws and would be inconsistent with the express language of and be preempted by the Cable Act.

After correctly recognizing that "Arkansas has clearly authorized municipalities to enter into the cable television business," [6] 930 F.2d at 1313-14, the court leaps to the determination that "[b]ecause of the nature and extent of municipal operations, the displacement of competition necessarily results whenever the state authorizes municipalities to enter into an industry with monopolistic tendencies." *Id.* at 1314. Finally, the court held that a sufficient state policy to displace competition exists since the challenged anticompetitive restraint is a necessary and reasonable consequence of the City's statutorily authorized entry into the cable television market. *Id.* As such, the court determined that state action immunity attached as a matter of law to the acts of the City and CLW with respect to their operation of a cable television system. *Id.*

The Arkansas Legislature is authorized to enact laws regulating the cable television industry only to the extent not inconsistent with the Cable Act.[7] The regulation of

---

[6] The pertinent Arkansas statutes are fully quoted in Petitioner's Brief at page 3 and at 930 F.2d at 1313 n.3.

[7] Section 556(c) of the Cable Act provides:

[Continued]

cable television is a national interest in which local authorities are permitted to participate only to the extent allowed by Congress. The purposes of the Cable Act are, *inter alia*, to "establish franchise procedures and standards which encourage the growth and development of cable systems" and to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." 47 U.S.C. § 521(2) and (6). While it is clear that the Cable Act established the parameters under which states and local governments can regulate cable television, it is equally apparent that two of the principle purposes behind the Act were to encourage the growth of privately owned cable companies and to encourage a competitive marketplace.

The legislative history of the Cable Act provides further support of a Congressional purpose to assist private enterprise:

> By establishing a national framework and Federal standards for cable franchising, [the Cable Act] provides the cable industry with the stability and certainty that are essential to its growth and development. In adopting this legislation, the Committee has endeavored to create an environment in which cable will flourish, providing all Americans with access to a technology that will become an increasingly important part of our national communications network.

H.R. Rep. No. 934, 98th Cong., 2d Sess. 18, 20, *reprinted in* 1984 U.S. Code Cong. & Admin. News 4655, 4657 (hereinafter "H.R. Rep." at ——; ——.); *see also Id.* at 72; 4709 (a cable operator has an expectancy interest

---

[7] [Continued]

Preemption

Except as provided in section 557 of this title, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.

in renewal of its franchise to protect its investment); 130 Cong. Rec. S14,283 (daily ed. Oct. 11, 1984) (statement of Sen. Packwood expressing the need to help cable achieve its full potential and compete in the marketplace). Other legislative history demonstrates competition as a key Congressional purpose. H.R. Rep. at 22-23; 4659-60 ("the public interest is served by this competition, and it should continue."). In fact, several courts have recognized that the primary purposes of the Cable Act include the encouragement of the growth of the cable industry and the promotion of competition.[8]

Given the stated purposes of the Cable Act, it cannot be asserted, as the Court of Appeals has done, that the two Arkansas statutes which authorize municipalities to construct and operate cable systems reflect a clearly articulated state policy to support anticompetitive conduct by the City and CLW in order to displace private enterprise. Such an interpretation would be inconsistent with the Cable Act and the limited congressional authority placed in state hands. In fact, the Arkansas statutes were enacted after the effective date of the Cable Act, and, thus, the Arkansas Legislature was deemed to be aware of this federal law. *See Traynor v. Turnage*, 485 U.S. 535, 546 (1988); *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979).

In the same vein, it does not follow either from the language of the Cable Act or from the Arkansas statutes themselves that the challenged anticompetitive conduct of the City and CLW is a "necessary and reasonable consequence" of the City's statutorily authorized entry into the cable television market. While the Cable Act specifically authorizes municipalities to provide cable service,

---

[8] *See* City of New York v. F.C.C., 486 U.S. 57 (1988); National Cable Television Ass'n, Inc. v. F.C.C., 914 F.2d 285 (D.C. Cir. 1990) (*en banc*); Cable Investments, Inc. v. Woolley, 867 F.2d 151 (3d Cir. 1989); Centel Cable Television Co. of Florida v. Admiral's Cove Associates, Ltd., 835 F.2d 1359 (11th Cir. 1988).

47 U.S.C. § 533(e)(1),[9] this authorization must be read in conjunction with the purposes set forth in Section 521 and other provisions of the Cable Act. The Eighth Circuit's conclusion that cable service has monopolistic tendencies, not based on any evidence in the record, is inconsistent with Section 541(c) of the Cable Act, which provides that "[a]ny cable system shall *not* be subject to regulation as a . . . *utility* by reason of providing cable service." (emphasis added). *See also* H.R. Rep. at 60; 4697. Consequently, the language of the Act is directly inconsistent with the City's arguments below that the provision of cable service is a "utility," and, thus, a "monopoly public service" within the state action exemption.[10]

If it is true that the state statutes did reflect a clearly articulated policy to displace competition in the cable market or contemplated that the conduct of the City and CLW is a necessary and reasonable consequence of their entry into the cable television market, the Arkansas statutes would be open to preemption challenges under the Supremacy Clause of the United States Constitution[11]

---

[9] Section 533(e)(1) of the Cable Act provides: "Subject to paragraph (2), a State or franchising authority may hold any ownership interest in any cable system."

[10] In fact, the legislative history to the Cable Act, the FCC and court decisions have recognized that the provision of cable service is not a monopoly. *See, e.g.*, Senate Comm. on Commerce, Science and Transportation, S. Rep. No. 98-67, 98th Cong., 1st Sess., 29-30 (1983); In re Community Cable TV, Inc., C.S.R.-2269, p. 13, (adopted November 15, 1983); In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service, FCC-90-276 (July 31, 1990) at ¶¶ 9 and 13; Cable Holdings of Georgia, Inc. v. Home Video, Inc., 825 F.2d 1559 (11th Cir. 1987); Satellite Television & Associated Resources, Inc. v. Continental Cablevision of Virginia, Inc., 714 F.2d 351, 355 (4th Cir. 1983); *cert. denied*, 465 U.S. 1027 (1984); Cable Alabama Corp. v. City of Huntsville, Alabama, 768 F. Supp. 1484, 1499 n.19 (N.D. Ala. 1991). Any such analysis is fact-laden and inappropriately resolved on a motion to dismiss. *See* Poller v. Columbia Broadcasting, 368 U.S. at 473; Employing Plasterers Ass'n, 347 U.S. at 188-89.

[11] Article VI, cl. 2 of the United States Constitution.

and the Cable Act. Moreover, if the *Paragould* decision is allowed to stand, the door will be open for other states and local governments to displace private cable service with the provision of cable service as a monopoly public service, in direct contravention of the Cable Act and the antitrust laws.

III. A GOVERNMENTAL REQUIREMENT THAT A CITIZEN SURRENDER ITS FIRST AMENDMENT RIGHTS AS A CONDITION OF RECEIVING A FRANCHISE FROM THE GOVERNMENT IS UNCONSTITUTIONAL.

In order to provide cable service, a cable operator must apply for and obtain a franchise from the local franchising authority. The Eighth Circuit, on its own initiative, held that a cable operator may bargain away constitutional rights by the mere acceptance of a franchise. Ignoring the fact that this "contract" is with a governmental entity and not between private citizens, the appellate court allows a local government to condition the grant of a privilege or benefit on the deprivation of a protected right. That conclusion is contrary to precedent of this Court and to the common sense recognition of the disparity in bargaining positions between a franchising authority and a cable operator.[12]

It is beyond challenge that the provision of cable television service is protected by the First Amendment. *Preferred*, 476 U.S. at 494; *Leathers v. Medlock*, —— U.S. ——, 111 S.Ct. 1438 (1991). However, these rights have

---

[12] Although the petition addresses the issue as one of "waiver" of a constitutional right, this Court need not reach the factual determination inherent in the assertion of such an affirmative defense. *See* Rule 8(c), Fed. R. Civ. P. The Cable Operators contend that waiver cannot be determined on a motion to dismiss when there are no facts set forth in the complaint to affirmatively disclose that defense as a matter of law. To the contrary, no language contained in the franchise agreement indicates any intent by Cablevision to waive its constitutional rights. In fact, §§ 7.1 and 7.2 of the Franchise Agreement indicate just the opposite. In any event, any such determination requires factual development upon remand. *See* Los Angeles v. Preferred, 476 U.S. at 495.

been evolving only over the past ten or so years. Provisions contained in franchises in the 1970's are today universally recognized as unconstitutional and invalid. For example, many franchises signed by the Cable Operators in the 1970's required specific programming services to be provided on their cable systems. As case law developed, *e.g.*, *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), and as Congress specifically codified this case law in the Cable Act, 47 U.S.C. § 544, franchising authorities recognized the unenforceability of these provisions. The Eighth Circuit's decision potentially sets back the cable industry many years in the exercise of its recognized First Amendment rights.

This Court has acknowledged that constitutional "liberties . . . may be infringed by the denial of or placing of conditions upon a benefit or privilege." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). However, the City's action (requiring the surrender of constitutional rights as a condition of receiving a governmental privilege) falls squarely within the type of conduct which may ultimately result in the erosion of constitutional rights. Notwithstanding the Eighth Circuit's recognition that the challenged portion of the cable television franchise "limits free speech in the purest sense," 930 F.2d at 1315, it nonetheless held that a local government may require the surrender of constitutional rights as a condition of receiving a government privilege. If this decision is permitted to stand, "guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 594 (1926). Such a result is inimical to constitutional law.

Cable television operators cannot lawfully use the public rights-of-way and easements or provide cable service without first being granted a franchise by a franchising authority. 47 U.S.C. §§ 541(a)(2) and (b)(1). Consequently, the relationship between a franchising authority and a cable operator is not the simple contractual rela-

tionship in which the parties have equal bargaining power, as assumed by the Eighth Circuit. Instead, unless the franchising authority grants the cable operator a franchise, the cable operator is barred *by law* from constructing and maintaining a cable system in the franchise area and is barred *by law* from exercising its First Amendment rights as a cable operator in that city.

The Eighth Circuit erred as a matter of law to assume that cable operators and franchising authorities have equal bargaining power. The unequal bargaining positions are a creature of Congressional mandate. 47 U.S.C. § 541(b)(2). That disparity exists in every franchise process, but is exacerbated when the private cable operator must bargain with a franchising authority that is also a competitor. When the competitor's conduct is unrestrained by the antitrust laws the problem is compounded. Therefore, the Court of Appeals' determination that "Cablevision could have bargained for an unqualified right to solicit and transmit advertisements," 930 F.2d at 1315, is incorrect. Based upon this erroneous conclusion of fact, the Eighth Circuit then reached the incorrect conclusion of law that a cable operator can bargain away a constitutional right. This issue was certainly not one which should have been determined on a motion to dismiss. *See Preferred*, 476 U.S. at 495.

Amici suggest that the correct approach is to recognize the case's constitutional dimension, and not to rely solely on contract law. In this fashion, one balances the government's regulatory interest and the cable operator's constitutional rights. This approach is analogous to the one used by this Court in *Frost*, in which a trucking company challenged a California statute on constitutional grounds. The statute prohibited the operation of a trucking company as a common carrier unless a permit was first granted by the appropriate governmental authority; empowered the state to regulate trucking companies; and prohibited the operation of a trucking company without a certificate from the state under "such terms and conditions as [the state] in its judgment the public convenience

and necessity may require." 271 U.S. at 590. *Frost* argued that the regulation compelled it into a position which it would not otherwise have accepted, common carrier status, in order to receive a government privilege—a certificate of public convenience and necessity.

This Court framed the issue before it as "whether the state may bring about the same result by imposing the unconstitutional requirement as a condition precedent to the enjoyment of a privilege, which, without so deciding, we shall assume to be within the power of the state altogether to withhold if it sees fit to do so." *Id.* at 592-93. Although this Court recognized a government's legitimate authority to regulate its highways, the Court held that unconstitutional conditions could not be lawfully imposed on the grant of a government privilege:

> . . . [C]onstitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition which the carrier is free to accept or reject. In reality, the carrier is given no choice, except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden.

Id. at 593. In explaining the rationale, this Court stated:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon

> such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.

Id. at 593-94.[13] In fact, this Court has followed this principle[14] even when the challenge occurs after the acceptance of benefits. *Kadrmas v. Dickson Public Schools*, 487 U.S. 450 (1988).

In *Western & Southern Life Ins.*, this Court stated that it "has also held that a State may not impose *unconstitutional* conditions on the grant of a privilege". 451 U.S. at 657-58 (emphasis in original); *see also Wieman v. Updegraff*, 344 U.S. 183 (1952). Recently, the Seventh Circuit also expressed that "serious reservations arise when a local government with a virtual monopoly on cable access conditions a franchise contract with a cable programmer on the stipulation that the programmer waive certain constitutional rights." *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540, 1548 n.6 (7th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 839 (1990).

Applying these principles to this complaint, it is clear that the complaint sufficiently pled the elements of a violation of the cable television operator's First Amendment rights. It alleges that the franchise, as interpreted by

---

[13] *See also* Western & Southern Life Ins. Co. v. State Board of Equalization, 451 U.S. 648 (1981); Elrod v. Burns, 427 U.S. 347 (1976); Power Manufacturing Co. v. Saunders, 274 U.S. 490 (1927).

[14] This same constitutional principle has been applied in various other areas of the law. Perry v. Sindermann, 408 U.S. 593 (1972) (denials of public employment); Shapiro v. Thompson, 394 U.S. 618 (1969) (welfare payments); Sherbert v. Verner, 374 U.S. 398 (1963) (unemployment benefits); Speiser v. Randall, 357 U.S. 513 (1958) (tax exemptions).

the City, prohibits it from providing certain speech to its subscribers without first receiving the City's permission, and alleges that such a requirement violates the First Amendment. Complaint at ¶¶ 36 and 40. The Eighth Circuit's conclusion that the complaint does not state a cause of action is improperly founded on its conclusion that one may be compelled to contract away one's constitutional rights in exchange for receiving a governmental privilege. This complaint was improperly dismissed below.[15]

Permitting the Eighth Circuit's decision to stand damages the principles of constitutional law which this Court has applied since 1926. *Compare Hanover First Ins. Co. v. Harding*, 272 U.S. 494 (1926), with *Paul v. Virginia*, 8 Wall 169 (1869), and *Philadelphia Fire Ass'n v. New York*, 119 U.S. 110 (1886). Under the Eighth Circuit's decision, a governmental authority could require that *all* users of governmental facilities contractually surrender their First Amendment rights. It is inconceivable that this Court would hold that a cause of action does not exist for a First Amendment violation when a governmental entity requires the surrender of a First Amendment right as a condition for using a public auditorium or which requires surrender of a Fourteenth Amendment right as a condition for using a public right-of-way. It is equally incongruous that the Eighth Circuit should hold that a cause of action does not exist because the City required the surrender of a constitutional right as a condition for the use of its public rights-of-way.

The Court of Appeal's decision in *Paragould* is incorrect and should be reversed and remanded.

CONCLUSION

The petition for a writ of certiorari for the United States Court of Appeals for the Eighth Circuit should be granted.

---

[15] This decision is not saved by the argument that the regulation is of commercial speech. Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 566 (1980).

Respectfully submitted,

TERRY S. BIENSTOCK *
PHILIP J. KANTOR
MARILYN DUCATO
BIENSTOCK & ASSOCIATES, P.A.
Southeast Financial Center
Suite 3160
200 South Biscayne Blvd.
Miami, Florida 33131-2367
(305) 373-1100
Counsel for Amici Curiae Tele-Communications, Inc., United Artists Entertainment Co., Storer Communications, Inc. and Comcast Cable Communications, Inc.

October 16, 1991

* Counsel of Record